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No. 88-713

In the Supreme Court of the United States

OCTOBER TERM, 1988

ACTION AUTOMOTIVE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its discretion in ordering petitioner to bargain with the certified representative of its employees notwithstanding events that occurred while petitioner was litigating its obligation to bargain.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B6) is reported at 853 F.2d 433. The decision and order of the National Labor Relations Board (Pet. App. C1-C2), including the decision of the administrative law judge (Pet. App. D1-D22), is reported at 284 N.L.R.B. No. 36.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1988. The petition for a writ of certiorari was filed on October 28, 1988. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner sells and distributes automobile parts and related products and services. In May 1981, Local 40,

United Food and Commercial Workers International Union, AFL-CIO (Local 40) won Board-conducted elections in a unit of clerical employees at petitioner's main office and a separate unit of the store and warehouse employees at the nine stores petitioner then operated in the Flint, Michigan, area. *Action Automotive, Inc.*, 262 N.L.R.B. 423 (1982). In January 1982, the Board rejected petitioner's objections to the conduct of the elections and certified Local 40 as the representative of petitioner's employees in the designated units. Petitioner refused to bargain with the union in order to test the certification. The Board denied petitioner's appeal and ordered it to bargain, with the initial period of certification to commence on the date good faith bargaining began. 262 N.L.R.B. at 425. The court of appeals denied enforcement of the Board's order, 717 F.2d 1033 (6th Cir. 1983), and this Court reversed. *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490 (1985). The Board's 1982 order was enforced by the court of appeals on May 13, 1986. Pet. App. D4; 794 F.2d 213.

2. In March 1985, shortly after this Court's remand, Local 876, United Food and Commercial Workers International Union, AFL-CIO (Local 876 or the Union) notified petitioner that it had merged with Local 40 and had succeeded to Local 40's representation rights. The Union requested the names and addresses of all unit employees and asked that petitioner bargain with it, in compliance with this Court's decision. Petitioner refused the request on the ground, inter alia, that the 1981 elections were conducted in units that were no longer appropriate and that, accordingly, it had had no current obligation to bargain with the union. Pet. App. B2, D4-D5. Additional unfair labor practice charges were filed, and a complaint issued, alleging that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1)

and (5), by refusing to furnish the requested information. Pet. App. D4.

The Board sustained the allegations of the complaint. It rejected petitioner's contention that employee turnover, increases in the employee complement, and operational changes manifested by the relocation of existing stores and opening of new ones justified its refusal to bargain. Relying on *Brooks* v. *NLRB*, 348 U.S. 98 (1954), the Board explained that, "absent unusual circumstances, a union's majority status is *irrebuttably* presumed to exist throughout the 1-year period following the union's certification," and that employee turnover since the certification is "not the sort of 'unusual circumstance' (such as dissolution of or substantial schism within the Union) that would permit rebuttal of the Union's presumed majority status[.]" Pet. App. C1-C2 n.1 (emphasis in original). The Board further noted that petitioner's expansion of the workforce and relocations "are merely reflective of economic growth achieved through normal business successes during the substantial delays attributable to its own failure to recognize the results of the Board elections." *Id.* at D17.[1]

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[1] In finding that these changes did not alter "the basic character of the employing enterprise" (Pet. App. D18), the Board noted that (*ibid.* (footnote omitted)):

> Classifications have remained unchanged and bargaining unit work is not shown to be functionally different from that performed at the time of the elections. Thus, the separate community of interest and identity delimited by the original unit determinations does not appear to have been blurred by interchange or other factors which preclude effective collective bargaining or render that process economically impracticable or impossible.

Three of the stores covered by the 1982 certification had since relocated to larger quarters in the same trade or market area. Pet. App. D17. Employees at the additional stores petitioner had opened were not within the designated bargaining units (*id.* at B4; see 262 N.L.R.B. at 425), and would not be covered by the bargaining order here.

Accordingly, the Board found that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing to furnish the Union with relevant information, and the Board ruled that the one-year irrebuttable presumption period following the Union's certification as bargaining representative would commence on the date that petitioner began to bargain in good faith with the Union. Pet. App. D19 (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962)). The Board ordered petitioner, inter alia, to furnish the Union with a list of employees in the bargaining units and their current addresses. *Id.* at C2, D20-D22.

3. The court of appeals affirmed the Board's decision and enforced its order. Pet. App. B1-B6. The court rejected petitioner's claim that its "massive expansion" excused its refusal to bargain, since "the certification affects only present employees at the locations in existence when the election was held." *Id.* at B4. The court found that the cases relied on by petitioner in which the Board had found unusual circumstances sufficient to overcome the *Brooks* presumption were factually distinguishable from this case and that, in any event, "[t]he exception to the certification year rule permitted in those two cases applies only when the Board * * * considers a formal petition for an election filed during the certification year, not when an employer has resorted to 'self-help' by refusing to bargain." *Id.* at B5. Relying on *Brooks,* 348 U.S. at 103, the court noted that " '[i]f an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge

of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention.' " Pet. App. B6.

ARGUMENT

The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. This Court held in *Brooks,* 348 U.S. at 104, that barring unusual circumstances a union's majority status may not be questioned during the year following the union's certification. The certification year has never started to run in this case, because that period does not begin until the employer commences bargaining with the union in good faith, and petitioner has not yet done so. Petitioner does not dispute those principles. Rather, it asserts that employee turnover and expansion of its operations during the period it was litigating its objections to the representation election constitute unusual circumstances within the meaning of *Brooks* and therefore justified petitioner's refusal to bargain. There is no merit to that contention.

This Court has consistently held that a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain with the union. Otherwise, as the Court explained in *Franks Bros.* v. *NLRB,* 321 U.S. 702, 705 (1944), "procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law." See also *NLRB* v. *Katz,* 369 U.S. 736, 748 n.16 (1962); *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 610-611 (1969). See *Fall River Dyeing & Finishing Corp.* v. *NLRB,* No. 85-1208 (June 1, 1987), slip op. 9-11.

This case aptly illustrates that concern. The Union proved its majority status seven and one-half years ago by winning an election among petitioner's employees. The entire period of time since that election has been consumed in litigating petitioner's objections to the election (including review by this Court) and the additional unfair labor practice charges brought against petitioner because of its continuing refusal to bargain with the Union. Under these circumstances, petitioner cannot properly rely on employee turnover and expansion of its business[2] during the process of litigation as a justification for its continuing refusal to bargain.[3]

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[2] The Board found that the business expansion in this case was "merely reflective of • • • normal business successes." Pet. App. D17. The court of appeals rejected petitioner's claim that its business had undergone a "massive expansion" of a type that constitutes an "unusual circumstance" under *Brooks*. Pet. App. B4.

[3] Although, as petitioner notes (Pet. 9-10), it was not required to negotiate with the Union during the pendency of its certification challenge, petitioner continued to refuse to recognize and bargain with the Union even after this Court had finally upheld the propriety of the certification. *Franks Bros.* makes clear that petitioner was free to challenge the Union's certification, but also that petitioner is not relieved of the foreseeable consequences of the time consumed by its litigating strategy once litigation has confirmed its obligation to bargain with the Union. None of the cases cited by petitioner is to the contrary.

Moreover, contrary to petitioner's assertion (Pet. 9-10), it could have bargained with the Union, subject to its challenge to the certification, and made any resulting contract conditional on ultimate judicial validation of the certification. See *United Aircraft Corp.* v. *NLRB*, 434 F.2d 1198, 1200-1201 (2d Cir. 1970), cert. denied, 401 U.S. 993 (1971). The cases petitioner cites, *Technicolor Government Services, Inc.* v. *NLRB*, 739 F.2d 323, 326 (8th Cir. 1984), and *King Radio Corp.* v. *NLRB*, 398 F.2d 14, 20-21 (10th Cir. 1968), do not preclude that course. Those cases merely hold that, once a union had been certified, where an employer does not pursue its objections to an election

2. The courts of appeals have consistently rejected employers' claims of employee turnover as a justification for refusing to bargain with a Board-certified union during the certification year. See, *e.g.*, *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir. 1988), cert. denied, No. 87-2126 (Oct. 3, 1988); *NLRB* v. *Best Products Co.*, 765 F.2d 903, 913-914 (9th Cir. 1985); *NLRB* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969). None of the cases cited by petitioner is to the contrary.

Petitioner cites (Pet. 11-14) several courts of appeals decisions for the proposition that employee turnover, expansion of the bargaining unit, and the passage of time, are relevant in determining whether a bargaining order should be enforced. Those cases, however, are inapposite since they did not involve a Board certification on the basis of an election. In each of those cases, the Board had issued a bargaining order under *NLRB* v. *Gissel Packing Co., supra. Gissel* held that, although Board "elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," the Board may issue a bargaining order without holding an election, or a new election, when it determines that an employer's unfair labor practices "have made [it] unlikely" that a fair election or repeat election can be held. 395 U.S. at 602, 610. The cases cited by petitioner hold that, in making the determination whether a fair election can be held, the Board must take into con-

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by refusing to bargain with the union in order to obtain judicial review, the employer cannot later collaterally challenge that certification in a subsequent unfair labor practice proceeding. The court stated in *Peabody Coal Co.* v. *NLRB*, 725 F.2d 357, 365 (6th Cir. 1984), that recognition of a union during the pendency of a certification challenge might be taken as a waiver of the challenge. But that statement was dictum, because there was no issue of a conditional offer to bargain pending the certification challenge.

sideration the probable effect of past violations on present employees. See, *e.g., J.J. Newberry Co.* v. *NLRB,* 645 F.2d 148, 153 (2d Cir. 1981). None of the cases cited by petitioner held that the factors to be considered in that context affect the enforceability of a Board order to bargain with a union that was certified on the basis of an election, which is the preferred method of determining whether a union has majority support. *Gissel,* 395 U.S. at 602. See, *e.g., NLRB* v. *Star Color Plate Service, supra.*

The Board's decisions cited by petitioner are also distinguishable. *St. Regis Paper Co.,* 285 N.L.R.B. No. 39 (Aug. 10, 1987), slip op. 5-7, did not involve the certification year presumption. It was an accretion case (see 239 N.L.R.B. 688 (1978)), and the Board found that contraction of the employer's business, including the closure of the accreted location, rendered the bargaining order moot. In *St. Bernadette's Nursing Home,* 234 N.L.R.B. 835 (1978), the facility in which the union was certified was closed for economic reasons during the certification year. Although some of the represented employees were hired in a new and substantially larger facility, the Board found that the union's certification had not survived the closing, since the new facility replaced not only the unit in which the union was certified, but other closed facilities in which the union had not established any bargaining rights. 234 N.L.R.B. at 837. *Molded Fiber Glass Body Co.,* 182 N.L.R.B. 400 (1970), involved a plant that had permanently closed for business reasons during the certification year and reopened after that year had elapsed with only a "handful" of the former employees. The Board found that, under the circumstances of that case, which included good faith bargaining by the employer during the certification year, there was no reason to extend the period in which the union enjoyed an irrebuttable presumption of

majority status. 182 N.L.R.B. at 400-401.[4] The issue in *Westinghouse Electric & Mfg.*, 38 N.L.R.B. 404 (1942), and *Renaissance Center Partnership*, 239 N.L.R.B. 1247 (1979), was not whether an employer could refuse to bargain, but whether the Board, in the exercise of its discretion, would process an election petition within the certification year. As the court of appeals correctly noted (Pet. App. B5-B6), *Brooks* does not entitle an employer "to vindicate the rights of his employees to select their bargaining representative" by refusing to honor a certification instead of seeking recourse before the Board. 348 U.S. at 103. In any event, *Westinghouse* and *Renaissance Center Partnership* are factually inapposite.[5]

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[4] In citing *Molded Fiber Glass*, petitioner quotes (Pet. 9) from the decision of the administrative law judge, 182 N.L.R.B. at 403, but the ALJ's reasoning on that issue was not adopted by the Board. *Id.* at 400-401.

[5] In *Westinghouse*, in directing a representation election in the face of a projected quadrupling of the employee complement, the Board indicated that, if the size of the unit did grow as projected, the Board would process a representation petition filed by a rival union during the certification year. 38 N.L.R.B. at 409. Contrary to petitioner's contention (Pet. 13), the decisive factor in *Renaissance Center Partnership* was not an increase in the size of the bargaining unit, but rather the fact that the consolidation of the recently certified unit with a larger unit of unrepresented employees in the same job classification had "completely obscured the separate identity of the certified bargaining unit" (239 N.L.R.B. at 1248). In this case, by contrast, the Board expressly found that "the separate community of interest and identity" of the original bargaining units had not been affected by any intervening events. Pet. App. D18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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